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No. 82-729

In the Supreme Court of the United States

OCTOBER TERM, 1982

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,
APPELLANTS

v.

TIME, INC.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

REPLY MEMORANDUM FOR THE APPELLANTS

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TABLE OF AUTHORITIES

Page

Cases:

Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 2

Wagner v. *Simon*, 534 F.2d 833, aff'g 412 F. Supp. 426 1

Constitution and statutes:

United States Constitution, First Amendment 2, 3, 4

18 U.S.C. 474 para. 6 2

18 U.S.C. 504 ..... 2, 4

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1. The district court in this case has declared unconstitutional a federal statutory scheme that places certain restrictions on the reproduction of photographs of United States currency. Appellee argues (Mot. to Aff. 19) that the judgment below should be affirmed summarily because it is "so plainly correct, and so manifestly compelled by the prior rulings of this Court * * *." Appellee, however, fails to cite a single decision by this Court that is directly in point; rather, it argues by analogy, relying on a number of cases involving different statutes that regulated different types of expressive conduct. In fact, the statutory scheme at issue here was *upheld* by the only other courts to have considered its constitutionality. See *Wagner* v. *Simon*, 534 F.2d 833 (8th Cir. 1976), aff'g 412 F. Supp. 426 (W.D. Mo. 1974). The conflict between the decision below and that of the Eighth Circuit in *Wagner* v. *Simon* is itself a sufficient reason for this Court to note probable jurisdiction.

Moreover, there is no dispute in this case that the Constitution grants Congress broad powers to protect the integrity of our Nation's currency. Appellee concedes that Congress may, without running afoul of the First Amendment, exercise these powers by placing some restrictions on the reproduction of photographs of United States currency (*e.g.*, by prohibiting counterfeiting). At the same time, we agree with appellee that the statutes at issue—18 U.S.C. 474 para. 6 and 18 U.S.C. 504—may have the effect of restricting the publication of some photographs of currency that have little capacity to deceive or defraud. But the point that appellee ignores is that in enacting these statutes Congress sought to strike a balance between legitimate First Amendment concerns and legitimate law enforcement concerns by permitting reproduction of photographs of currency for expressive purposes so long as certain reasonable conditions—designed to protect against fraudulent use of those photographs—are satisfied. That congressional judgment is entitled to considerable respect. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973). Given the unquestionably substantial governmental concerns addressed in the statutory scheme, the deference due to Congress' judgment (particularly where it conscientiously has attempted to accommodate legitimate constitutional concerns), and the absence of controlling authority that squarely supports the decision below, we submit that this case warrants plenary review by this Court.

2. The main thrust of appellee's argument is that Section 474 para. 6 and Section 504 bear no substantial relation to the statutory goal because they prohibit publication of some photographs of currency that could not successfully be used to deceive. Appellee suggests (Mot. to Aff. 29) that "[t]he solution to the problem presented in this case" is to hold unconstitutional a federal statute that has been in

existence for more than a century, because "Congress plainly knows how to write" a new statute that would avoid the constitutional problems that appellee perceives. Appellee points to several unenacted legislative proposals that would punish the making, uttering or possession of a counterfeit written instrument with intent to deceive or defraud another person or a government (Mot. to Aff. 29-30 n.19).

If appellee is correct that Congress may not constitutionally punish those who publish photographs of United States currency unless it can show an intent to deceive or defraud, then the government would be powerless to prevent appellee or any other publisher from printing full size, full color reproductions of $100 bills, so long as the publisher could validly claim that the reproductions "constitute important editorial material" (Mot. to Aff. 24) protected by the First Amendment. While a publisher may have a perfectly legitimate editorial purpose for reproducing an exact or substantially identical copy of United States currency and may in truth lack any intent to deceive or defraud, individual purchasers of publications containing the facsimiles might not share that innocent intent and might seek to pass the facsimiles to others. The statutory scheme at issue here is designed to safeguard against precisely this sort of situation, which carries the potential for widespread deception and fraud. Although the government could, under the proposed statutes, proceed against any individual caught passing the facsimiles as real currency, it would be difficult, if not impossible, to enforce such a statute in an effective manner.

3. Appellee contends that the statutory scheme "directly and dramatically abridges the freedom to communicate" and "significantly restricts the editorial content of Time's magazines" (Mot. to Aff. 10, 21). Under the statutory scheme, however, appellee is free to publish photographs of

United States currency in its magazines so long as those photographs are in compliance with the reasonable color and size requirements of 18 U.S.C. 504. Thus, it is absurd to argue that freedom of expression is meaningfully restricted by the statutes at issue here. Appellee's grossly exaggerated contentions reflect an extreme approach that, if accepted, would result in the trivialization of the First Amendment and the important values it embodies. This Court should reject appellee's extreme approach and should grant plenary review to consider the substantial constitutional question presented by this case.

For the foregoing reasons and those stated in the jurisdictional statement, it is respectfully submitted that probable jurisdiction should be noted.

REX E. LEE
Solicitor General

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